



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.472 OF 2016**

**ALLAN ODHIAMBO .....CLAIMANT**

**VERSUS**

**PLAN INTERNATIONAL .....RESPONDENT**

**JUDGEMENT**

The claimant listed the following Issues in dispute

1. Whether the claimant anticipated employment from the respondent
2. Whether the claimant was in employment initially;
3. Whether the respondent had admitted liability to pay the claimant the inconvenience and the loss of employment caused to him; and
4. Whether the claimant has been paid damages, and if not, why, and how much is fair in the circumstances.

1. The claimant acting in person filed the Memorandum of Claim on 29<sup>th</sup> November, 2016 against the respondent, a non-governmental organisation registered under the NGO Act as Plan International.

2. The claim is based on the following facts – on 26<sup>th</sup> July, 2016 the respondent notified the claimant through an email that he was successful following an interview he had attended with them that he was the Project Implementation Officer and that he would be based in Bondo. The claimant at the time was employed by Church World Service (CWS) earning a salary of ksh.65, 966.10 per month

3. The claimant had requested for permission from CWS to attend the interview with the respondent following the email sent by the human resource, Cynthia Tiany. Following the interview and offer of employment and salary of ksh.90, 000.00 per month by the respondent, the claimant accepted the same.

4. On 29<sup>th</sup> July, 2016 the respondent sent the claimant for medical examination and was recommended fit for the job. All persons listed as referees responded to the respondent as required by the respondent.

5. The human resource manager for the respondent proceeded to process the letter of appointment and on 29<sup>th</sup> July, 2016 the claimant tendered his resignation notice with CWS. Through a phone call with Ms Tiany for the respondent, the claimant was to report for duty with the respondent on 15<sup>th</sup> August, 2016. On 8<sup>th</sup> August, 2016 the claimant reminded Ms Tiany of his preparations to join the respondent's employment.

6. On 26<sup>th</sup> August, 2016 the claimant noted the change of events with the change by the respondent after he had already resigned from his employment with CWS and this caused him distress and anguish. Despite requests for an explanation the respondent failed to respond.

7. The claimant is seeking the following;

a) Transport and food Ksh.3,000.00;

b) Being 30 years old and anticipated retirement at 60 years the anticipated salary for 30 years at ksh.90,000.00 all ksh.27,540,000.00;

c) A declaration that the absconded letter of offer is null and void;

d) In the alternative the claimant be paid all damages and losses accrued due to the loss of the former employment and hardship [at a total of Ksh.27, 543,000.00.

8. The claimant testified that on 7<sup>th</sup> June, 2016 he was called for an interview by the respondent and which was done on 26<sup>th</sup> July, 2016. On 15<sup>th</sup> August, 2016 the claimant was called by Ms Tiany and told that he was successful for the job applied for and that they would do medical, background and references checks on him.

9. On this communication that the claimant had been successful after the interview, he resigned from his employment where he was based at Daadab Camp in anticipation that he would move to Bondo with the respondent. He also did the medical check and is aware the respondent contacted his referees and while waiting for the offer letter, the respondent has declined. This caused him anxiety, hardship and his children were forced to drop out of school for lack of school fees, his ailing mother died for lack of money for her medication and the respondent was not honest in failing to issue him with the letter of employment. After confirmation that the claimant had been successful following the interview he was happy and was awaiting the letter of appointment which was never issued.

10. In reply, the defence is that the claimant took part in an interview process for a Project Implementation Officer vacancy and was successful at the interview stage but was not confirmed for employment or issued with contract of employment or letter of offer and the alleged breach of anticipated employment by the respondent is denied.

11. The respondent as an international humanitarian child welfare organisation pursuant to a recruitment process undertaken in July, 2016 invited the claimant as one of the successful applicants and was duly notified of the same on 26<sup>th</sup> July, 2016. The claimant was informed that his employment would be conditional on successful background checks being undertaken. The interview process was only an initial step toward employment of the claimant and he was made aware of the procedures to be followed including referenced checks, medical examination, and a second interview with the programmes managers and a total background check. The claimant agreed to be taken through this process.

12. The claimant was treated fairly throughout the recruitment process and in a similar manner like other applicants. The contracting of the claimant was subject to mandatory conditions and requirements being met and he was made aware. There was no letter of offer made to the claimant or authority given for his resignation from his previous employer or a promise for employment. The claimant resigned from his previous employment out of his own volition.

13. From the resume sent to the respondent by the claimant, the claimant was last in stable employment in November, 2015. He cannot allege that he was forced to resign from such employment. The respondent cannot be held liable for the claims made by the claimant.

14. In evidence, Pauline Kakongo the Senior Human Resource Coordinator for the respondent testified that the recruitment process at the respondent is by applications from interested persons, there is a shortlisting and interviews are done and the human resource has to invite the candidates. Upon the interviews, the panel has to make a conclusion and give feedback.

15. From the successful candidates, the respondent has to undertake a background check, references check and a medical check. Upon returns on the checks an offer letter is done and upon acceptance, the contract of employment is executed.

16. The claimant was taken through all the stages but there was no offer as the background checks were not successful. A potential candidate only becomes an employee upon the offer letter. There was no employment offer made to the claimant. This stage of recruitment was not arrived at.

17. The claims that the claimant was frustrated by the respondent is not correct as he submitted his resume, identity card, medical references and referees and his last date of employment was November, 2015. He was interviewed in July, 2016 and on such date he had no employment so as to tender a resignation.

18. At the close of the hearing, both parties filed written submissions.

The court has taken into account the pleadings, the evidence and the written submissions and the issues which emerge for determination can be summarised as follows;

Whether there was anticipated employment and if so whether there was breach;

Whether special damages are due as claimed;

Whether damages and losses accrued for loss of former employment and hardship is due; and

What remedies exist.

19. When recruiting employees, the reason(s) why an employer ultimately decides to prefer one employee to others is an employer's discretion. If the employee is suitable for appointment, the employer retains discretion to appoint whom it considers to be the best appointment to suit the employer's operational needs.

20. On the additional dimensions for checks for medical, references and background apart from the interview results, such were premised on

successful interviewees based on the practice of the respondent. Had the claimant been subjected to different treatment from other candidates following the interview such would have been discriminatory. However, it is imperative for the employer to ensure the Full disclosure of the interview process to all the candidates. Such is to give the potential employee(s) a picture of what is expected.

21. It is common cause that the respondent advertised for position of Project Implementation Officer whereupon the claimant applied and was invited to the interviews.

22. By email message of Cynthia Tiany, Country Human Resource Administrator dated 26<sup>th</sup> July, 2016 the claimant was informed that;

***Interview Results: Project Implementation Officer – NORAD (Bondo)***

*With regard to the interview we did for the above mentioned position, we would like to let you know that you were successful. We shall be sending you an offer letter after we do some background checks so that you can see the terms of the position in brief.*

*Meanwhile we have sent reference check forms to your referees as indicated in your CV. We hope that the referees to get back to us by 4pm tomorrow (27<sup>th</sup> July, 2016) ...*

*As part of the background check process, we shall send you a letter to facilitate a pre-employment medical check that is mandatory for all incoming staff.*

*We confirm receipt of the copy of your ID and last payslip to facilitate other background checks. ...*

23. From the record, the claimant received the email message and acted promptly by alerting his referee David Kolweya and shared the email details with the respondent. There was an instant email message to the referee on 27<sup>th</sup> July, 2016.

24. On 28<sup>th</sup> July, the other referee Patricia Mwendu Chamia was contacted by the respondent.

25. The claimant also attended the medical check following a referral by the respondent. Such was for medical check and clearance. This is shared by Ms Tiany in the email message of 29<sup>th</sup> July, 2016 and further notes that;

*... I had mentioned that one of our Program Managers would like to meet. She got back to me and confirmed that she will be available on Wednesday 3<sup>rd</sup> August 2016 at 8am. We hope you can come to our offices which are located ... please confirm your availability.*

26. From the email and message of 26<sup>th</sup> July, 2016 it was made clear to the claimant that his interview was a success but would be issued with letter of offer upon several conditions. Such included various checks and a meeting. The respondent's officer was clear to the extent of stating that 'We shall be sending you an offer letter after we do some background checks so that you can see the terms of the position in brief'.

Was there employment between the parties herein?

27. An employer and employee are well defined in law. An employee may be employed by oral or written contract or upon casual service which is converted by application of the law as under section 37 of the Employment Act, 2007.

28. Where it is the intention of the parties to be governed under a written contract, such must be done pursuant to the provisions of section 10 of the Employment Act, 2007. A written contract must be executed by the parties to the employment relationship.

29. In this case, the claimant was informed that he was successful following his interview but several other steps had to follow. He had to await the letter of offer. Premised on the outcome of the offer, the details about his position was to follow.

30. The process and steps being undertaken following the successful interview seem to have been running concurrently. The claimant was sent for medical checks while the respondent sent a template to the referee given by the claimant. There is the outcome from the medical check and the outcome from the referee is left without any stated feedback.

31. The claimant testified that his referee returned a positive response. There is the reference returns by Ms Chamia with very positive notes about the claimant.

32. The other background check being undertaken by the respondent was facilitated by the claimant's identity card, pay slip and the resume he had submitted.

It is not clear what 'negative' feedback was sourced.

33. The defence is that the checks to be done to facilitate the issuance of an offer to the claimant did not give positive feedback. No offer was issued.

34. The court finds up and until the condition(s) precedent to the offer of employment was/were met and without the offer letter setting out

the terms and conditions of employment to the claimant for him to assess and confirm with an acceptance, there was no employment between the parties. The communication from the interview though successful was conditional. Without the offer letter being issued, there was no anticipated employment.

35. Such communication of a successful interview was conditional. It cannot be stated to be an unfair labour practice of discriminatory of the claimant.

36. To rely on such matter as unfair labour practice or that there was a discriminatory practice; the claimant must take account of section 5(3) of the Employment Act, 2007 which provides that;

*(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—*

*(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;*

*(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.*

37. Great regard must be gone into what a claimant is relying upon. The mere citations that one was subjected to unfair labour practice without material evidence or that there was a discriminatory practice without setting out how such alleged practice was applied to the claimant as against other persons similarly situated as himself cannot find justification for the court to award in damages. This is because, in this case the claimant was in constant communication with the respondent's officers and who at no time issued the letter offer for employment and upon which he was made to resign from his existing employment.

38. Such letter of offer and the acceptance thereof should have been the cut off from previous employment into new employment. Whatever the outcome of the checks the respondent was undertaking, such being precedent to offer for employment and contract for the position to be held, there was no anticipatory employment.

39. The claim for anticipated salary for 30 years to retirement is lost.

40. On the claim for special damages, the claimant applied for employment with the respondent and was invited for the interview and he offered himself for the same. The due transport costs were not incurred on a promise to be reimbursed by the respondent. Such claims are not due.

41. On the costs claimed, it is apparent that following the various checks the claimant was undertaking at the invitation of the respondent, there was no communication as to the outcome or the fact that after his successful interviews, the respondent would not issue the offer letter. Such kept the claimant in the dark forcing him to write and seek the intervention of the Country Director. Failure to disclose the full and material particulars of what entailed a successful candidate left the claimant without closure and blind to what was to follow without such communication. Had there been closure, a matter for the respondent to address, this suit should have been unnecessary. To learn about the subsequent employment particulars after filing suit was unnecessary. Where the respondent was candid, forthright and ensured full disclosure to the claimant, matters should have ended there.

42. The courts finds there was a legitimate and genuine expectation created by the respondent to the claimant that the outcome of the interview, the background checks and the results of success for offer of employment or a negative result was due. Such was a reasonable expectation. from the communications shared by the parties and the demands made by the claimant to the respondent for feedback, the result and closure of the recruitment process was imperative. Such is what entails fair labour practice.

43. Reasonable costs to the claimant are therefore.

**Accordingly, save for costs, the claims made are found without merit. The costs due to the claimant are hereby assessed at ksh.20,000.00.**

Delivered at Nakuru this 21<sup>st</sup> day of February, 2019.

**M. MBARU JUDGE**

In the presence of: .....